White Coffee Corporation and Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and William Stubbs. Cases 29-CA-7963 and 29-CA-7990

May 21, 1982

DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On July 31, 1981, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. We agree with the Administrative Law Judge's finding that Respondent discharged William Stubbs in violation of Section 8(a)(3) and (1) of the Act, but only for the reasons set forth below.

The Union began to organize Respondent's employees in April 1980.³ Robert Jones, an employee, was very active in the Union's campaign. He solicited authorization cards and met with union officials to discuss the organizing effort. Respondent discharged Jones on April 24, ostensibly because he was not doing his job properly. Jones was alleged-

ly pouring flavoring substances onto coffee beans instead of spraying it on, as he had been instructed to do. The Administrative Law Judge found, and we agree, that this reason was pretextual, and that Jones was really discharged because he was a union activist, in violation of Section 8(a)(3) and (1).

When he was discharged, Jones notified a union representative of that fact and the two of them filed a charge with the NLRB Regional Office. They then met with approximately 12 of Respondent's employees after the end of the shift. The union representative reviewed the situation, and the employees voted unanimously to go on strike the following day, Friday, April 25, in order to force Respondent to reinstate Jones and to recognize the Union as their bargaining agent. Beginning around noon on April 25, approximately 10 employees left work and picketed Respondent's plant. The Administrative Law Judge found, and we agree, that the strike which began on April 25 was an unfair labor practice strike because it was provoked by Jones' unlawful discharge.

William Stubbs was one of the employees who picketed on April 25. Stubbs' annual 1-week vacation had been scheduled to begin at noon on that day. Stubbs reported to work that morning and began to perform his job of roasting coffee. He did not join the other employees as soon as they began to picket, indicating that he would not do so until he completed his roasting work and prepared the orders for Monday. When he finished these tasks, shortly before noon, he joined the other employees and picketed throughout the afternoon. Stubbs did not picket during the rest of his vacation.

During his vacation, Stubbs received a letter from Respondent which acknowledged that he had not reported to work and stated that Respondent was obtaining replacements. Stubbs telephoned his supervisor, Seymour Smolin, on May 5 and asked if he could return to work. Smolin replied that he could not because he had worn a picket sign. Stubbs visited the plant the next day, and Smolin reiterated that he could not return to work because he had picketed. Relying on these two statements made by Respondent's supervisor, we find that, contrary to Respondent's contention, Respondent did not refuse to allow Stubbs to work because he had been replaced but, instead, discharged Stubbs because he had exercised his right under the Act to picket in support of the employees' unfair labor practice strike. We further find that Stubbs was discharged on May 5, at the end of his vacation, when he learned that Respondent would not permit him to return to work. Respondent's backpay liabil-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Nor do we find merit in Respondent's contention that, because the Administrative Law Judge generally discredited Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. N.L.R.B. v. Pittsburgh Steamship Company, 337 U.S. 656 (1949). We have further considered Respondent's contention that the Administrative Law Judge generally evidenced a bias against Respondent's position. We have examined the record and the attached Decision and reject these allegations.

² Member Jenkins does not rely on Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). That decision concerns identifying the cause of discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. The attempt to apply Wright Line in such a situation is futile, confusing, and misleading.

In the absence of any exceptions to the Administrative Law Judge's refusal to grant a remedial bargaining order, we find it unnecessary to pass upon this issue.

³ All dates herein are in 1980.

ity accrues from that date, as noted by the Administrative Law Judge.

2. The Administrative Law Judge implicitly found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate seven unfair labor practice strikers after they had made an unconditional offer to return to work. Accordingly, he recommended that Respondent reinstate these strikers, with backpay accruing from the date that Respondent rejected their offer to return to work. We do not agree with the Administrative Law Judge's implicit finding on this issue, and therefore we do not adopt his recommended remedy.

The Administrative Law Judge found that the strikers made an unconditional offer to return to work by letter dated June 18, and that Respondent rejected this offer by letter dated June 27. Counsel for the General Counsel, however, did not allege in the complaint or the amended complaint that Respondent had violated the Act by refusing to reinstate unfair labor practice strikers after an unconditional offer to return to work. At the outset of the hearing, counsel for the General Counsel clearly stated that the only remedy he sought was reinstatement and backpay for the unlawful discharges of Jones and Stubbs. He reiterated this at the conclusion of the hearing, even while acknowledging that there were several unfair labor practice strikers who had unconditionally offered to return to work. Respondent was therefore without notice that its refusal to reinstate the unfair labor practice strikers was at issue, and a full record was not developed respecting such a possible violation of the Act.

An administrative law judge's authority to amend a complaint "is clearly limited to those instances where the amendment is sought or consented to by the General Counsel, or where evidence has been received into the record without objection." Since counsel for the General Counsel did not seek to amend the complaint in this regard, and indeed specifically stated that a remedy was not being sought with respect to the unfair labor practice strikers, the Administrative Law Judge erred in implicitly finding that Respondent violated Section 8(a)(3) and (1) by not reinstating the strikers after an unconditional offer to return to work and in providing a corresponding remedy.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and that it take certain

affirmative action to effectuate the policies of the

Respondent shall offer Robert Jones and William Stubbs immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed. Respondent shall also make them whole for any loss of pay resulting from the discrimination against them by payment of a sum of money equal to the amount they normally would have earned from the dates of their discharges to the date of their reinstatement, less net interim earnings. Backpay shall include interest to be computed in the manner prescribed by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977).5

CONCLUSIONS OF LAW

- 1. White Coffee Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. By discharging Robert Jones and William Stubbs for engaging in union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.
- 3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 4. The strike which commenced on April 25, 1980, was an unfair labor practice strike from that date and throughout its duration.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, White Coffee Corporation, Queens County, New York, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Discharging, or otherwise discriminating against, employees because of their membership in, or activities on behalf of, Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

^{*} GTE Automatic Electric. Inc., 196 NLRB 902 (1972).

See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). In accordance with his dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

- 2. Take the following affirmative action necessary to effectuate the policies of the National Labor Relations Act, as amended:
- (a) Offer Robert Jones and William Stubbs immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (b) Make Robert Jones and William Stubbs whole for any loss of earnings they may have suffered due to the discrimination practiced against them in the manner provided in the section of this Decision entitled "The Remedy."
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at its plant in Queens County, New York, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge, or otherwise discriminate against, employees because of their membership in, or activities on behalf of, Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Robert Jones and William Stubbs immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Jones and William Stubbs whole for any loss of earnings they may have suffered due to the discrimination practiced against them by paying each of them a sum equal to what he would have earned, less any net interim earnings, plus interest.

WHITE COFFEE CORPORATION

DECISION

PRELIMINARY STATEMENT OF CASE—ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: This consolidated proceeding under the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (the Act), was litigated before me in Brooklyn, New York, on January 22 and February 18, 1981, with all parties participating throughout by counsel and given full opportunity to present evidence, arguments, proposed findings and conclusions, and briefs. After unopposed extensions of time to file briefs on applications of counsel, briefs or letters in lieu of briefs were received by April 7, 1981; those, together with the entire record, have been carefully considered.

The principal issues are whether Respondent violated Section 8(a)(3) and (1) of the Act through discharging, and failing and refusing to reinstate, or offer to reinstate its employees Robert Jones and William Stubbs because they exercised their rights under the Act by engaging in protected concerted activities, and whether a work stop-

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ Complaint in Case 29-CA-7963 dated May 29, growing out of a charge filed on April 24, 1980, by Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and consolidated amended complaint in Cases 29-CA-7693 and 29-CA-7990, dated June 6, based on an additional charge filed May 7, 1980, by William Stubbs in Case 29-CA-7990.

page and strike of Respondent's employees resulting therefrom was or became an unfair labor practice strike.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent has been and is a New York corporation engaged in processing, selling, and distributing coffee, tea, herbs, and related products at and from its principal office and place of business in the borough and county of Queens, city and State of New York, where, during the representative year immediately preceding issuance of the consolidated amended complaint, it purchased and received in interstate commerce directly from States other than New York over \$50,000 worth of such products.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that, at all of those times, Local 966, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts as Found

1. Background

Respondent Employer imports, roasts, grinds, and flavors raw coffee beans which it then packages, sells, and distributes to restaurants and other users. Respondent conducts its business in and from its Queens County, New York City, plant, consisting of a building approximately 300 feet by 75 feet containing a truck loading area (25 feet by 35 feet) whence a doorway leads to an L-shaped area (75 feet by 75 feet) comprising the coffee bean roasting and packaging area; an accessory coffee bean storage and general storage area (75 feet by 100 to 125 feet); a storage room (25 feet by 40 feet); a coffee spray area (15 feet by 15 feet); a general coffee machine repair shop (25 feet by 15 feet); and a general office area (50 feet by 20 feet). There is also an outside parking lot (75 feet by 75 feet). According to Respondent's plant and production manager, Smolin, the entire production area is 50 feet by 75 feet. In what is called the flavoring department, roasted coffee beans are fed into a pan and flavor-sprayed (e.g., cinnamon, cherry, orange, etc.) from a bottle while the beans are slowly stirred by a hand scoop or paddle.

Respondent's principal and president is Irwin White, and its plant and production manager and foreman in overall charge of its production operations and personnel is Seymour Smolin, who testified that he constantly walks through the plant to assure that employees are performing their work properly and that he observes each employee 10 to 30 times daily. Smolin has a desk just inside the truck loading area, and another which he

shares with employee Robert Jones in the center of the 50- by 75-feet production area where most of the employees work within his view. Respondent's plant work force consists of about a dozen (or perhaps as many as 18) production and maintenance employees and 7-8 truckdrivers, all functioning under Smolin's supervision. Respondent's discharge of two of those production employees, Robert Jones and William Stubbs, under circumstances to be described, resulted in the filing of the charges which gave rise to the instant proceeding.

2. Respondent's discharge of Robert Jones

Robert Jones entered Respondent's employ at the beginning of January 1980, functioning thereafter as an order picker, coffee flavorer, and delivery preparer. About 20 percent of his time, but on some days none at all, was devoted to flavoring coffee. At least five other employees also flavored coffee, a "very simple operation" requiring little if any skill.

Jones' work history remained unremarkable until he attempted-at the beginning of April 1980 at the behest of one of Respondent's truckdrivers who complained he was "tired and fed up" with Respondent's treatment of its employees—to solicit fellow production employees to sign the union authorization cards of the Charging Party Union for collective-bargaining purposes. In the course of the ensuing 2-week period in early April 1980, Jones distributed 11 union cards amongst Respondent's production employees, receiving 10 back filled in and signed. On April 14, Jones and several fellow employees met with the union representative at the Union's premises, where the employees described the perceived inadequacies of their existing terms and conditions of employment, and the objectives and mechanics of the union organizational attempt were explored, including the Union's intention to request Respondent to engage in collective bargaining with it.

Soon on the heels of the foregoing, on or about April 18, Jones received a complaint from Plant Manager Smolin that skids were being left in the aisles. Although these had been left there by packagers and Jones explained that he had not yet had time to move them, Smolin began shouting at Jones, provoking Jones to respond in like tones.2 On the very same day, while Jones was flavoring coffee as usual, Smolin again approached Jones and told him that a customer had complained about the taste of coffee he had received, so Smolin asked Jones to show him how he was doing it. Smolin expressed approbation following Jones' demonstration. A few days later, however, Respondent's principal, Irwin White, asked Jones also to show him how he was flavoring coffee. After Jones demonstrated it to White, the latter also expressed general approbation, while reminding him not to spray the flavor on the coffee beans too

² Although the incident, seemingly unparalleled in the previous work history, ended peaceably, without admonition or warning from Smolin, a few days later Jones apologized to Smolin, who again said nothing further about it.

heavily, and White left after complimenting Jones on the neatness of his work area.³

Also during the second week of April, Jones asked White for a pay increase. Expressing no adverse reaction to his work performance or the request, White referred Jones to Smolin.⁴ When Jones then spoke to Smolin about it, Smolin told him to bring it up a week later. When Jones did so, Smolin indicated he was thinking about it. According to Jones, Smolin told him on April 23 that he had put him in for a raise but that it would have to await the return of the company bookkeeper the following week.⁵

On April 23, Jones collected five signed union cards from fellow employees in the warehouse and back area during the course of the day until the end of the afternoon.

When Jones reported to work at 7:45 a.m. on Thursday, April 24, he was met at the timeclock by Smolin, who asked him whether he had received a telegram the previous evening. Jones said no.⁶ Smolin thereupon handed Jones a check and told him his services were no longer required. When Jones asked him why,⁷ Smolin replied that it was because Jones had been "fooling around yesterday in the back area.⁸ . . . That's all I can tell you" and would say no more.

White (according to his testimony) instructed Smolin to fire Jones because "he was not performing his work properly and was incompetent." In no way has this been credibly established; indeed, the substantial credible proof is to the contrary. According to Smolin, on April 23 he observed Jones pouring, instead of spraying, flavoring substance on the coffee beans as he had previously been instructed to do. I credit Jones' testimony that after he had been instructed, long prior to April 23, to spray the flavoring on he consistently followed that practice. There is no substantial credible proof that he was in any respect not doing his job properly.

3. Sequel to Respondent's discharge of Robert Jones: Protest strike by Jones' fellow employees

Jones immediately notified his union representative of the circumstances of his discharge, and followed his advice to meet him at the Union's office and thence to proceed to the NLRB Regional Office to file an unfair labor practice charge. They then returned to a park near the plant, where they met with Jones' fellow employees after the end of their shift at or around 4:45 p.m. There, after Union Representative McCarthy reviewed the situation and Jones' discharge with the assembled dozen or so plant employees, they unanimously voted to go on strike the following day (Friday, April 25) in protest to "get Robert [Jones] reinstated and for us . . . to be recognized as a union," they having unanimously agreed at that April 24 afternoon meeting to "stick together because if he's going to do it to one he'll do it to [us] all, so if he [i.e., Irwin White, Respondent's principal] refuses to reinstate him [i.e., Robert Jones] we had better walk at that point and time, hit the street." And, because White totally ignored all attempts to talk to him, the employees thereupon did indeed carry out their resolution, with about 10 employees—including William Stubbs, discussed below-picketing Respondent's premises commencing around noon, April 25, under the observation of Smolin and White, the latter walking past the individual picketers with pen and paper and making notes. 10 Prior to starting the picketing, according to the credited testimony of Union Trustee and Representative McCarthy, when the latter approached White to discuss Jones' discharge and the Union's representative status, White remained mute and simply walked away.¹¹ When McCar-

³ Although White denies this episode or, indeed, that he at any time discussed Jones' work performance with him, on the basis of comparative testimonial demeanor observations, considering that both White and Jones are interested witnesses, I prefer and credit the testimony of Jones. Observing Jones as he testified, I find it difficult to believe that Jones simply invented the described episode, nor is there persuasive basis for why he would. It is, moreover, noted that although White denied the described episode on both direct and cross-examination, on later cross-examination he conceded that "I may have told him something. I don't remember specifically." Under these circumstances, I prefer and credit Jones' superior recollection.

⁴ For reasons already explicated (fn. 3, supra), I credit Jones' testimony in preference to White's denial that this occurred.

⁵ Smolin's version is that he actived I leave a supraction of the supractical supractical

⁵ Smolin's version is that he refused Jones' request for a raise because he was "not doing your job properly"—meaning that Jones was not maintaining his storage area properly and was pouring instead of spraying flavoring substance on the coffee beans. Although, according to Smolin on direct examination, this provoked the rejoinder from Jones that "I'm doing a good f—ing job and [you're] a son of a bitch," by cross-examination time Smolin altered or embellished this to add that Jones told him, "You are] no f—king good."

[&]quot;[You are] no f—king good."

There is in evidence a Western Union "mailgram" stating it is "a confirmation copy of the following [telephone?] message" to Jones, seemingly logged in at 4:45 p.m. on April 23: "Do not report to work any more as of Thursday 4-24-80. Your services are no longer required." (Resp. Exh. 2). However, a Western Union report to Respondent concerning this mailgram seemingly indicates that it was indeed not delivered, since it states that Jones was "unknown" at the address given (Resp. Exh. 3).

Respondent's regular payday is on Friday, not Thursday.

⁷ I do not credit Smolin's testimony that Jones did not ask him why he was being fired. The testimony of Respondent's witness and Shipping Manager Jack Levy, that he neither participated in nor heard any conversation between Smolin and Jones on the occasion in question, while Levy was checking delivery trucks in his normal morning routine, about 30 feet distant from the timeclock, with an intervening wall, does not detract from this finding, particularly since, as pointed out by Respondent's counsel in another connection, Levy is hard of hearing.

⁸ This could only have been a reference to Jones' distribution and solicitation of union cards in the "back" of the plant, i.e., the warehouse, dressing room, loading space, men's room, and roasting areas, where he had distributed and solicited signatures on those cards, and where he had collected five signed cards from fellow employees on April 23, the day he was summarily discharged by Respondent's April 23 mailgram.

⁹ Flavoring substances which come in gallon jugs are funneled off into quart plastic spray bottles equipped at the top with a plunger.

The foregoing is based substantially on the testimony of Robert Jones, whom I observed to be a singularly straightforward and impressive witness whose testimony is worthy of credit. Jones' testimony was in part corroborated by the credited testimony of his fellow employee William Stubbs and Union Trustee and Representative Glenn C. McCarthy, likewise witnesses of excellent quality.

¹¹ I do not credit White's testimony flatly denying that this ever occurred, and that his first intimation as to any union activity or interest came totally "out of the blue" when he observed the picketing employees. I am also not favorably influenced by the fact that, notwithstanding White's denial on direct examination, he conceded on cross-examination that Union Representative McCarthy did indeed speak to him, but that he did not respond to McCarthy. This would appear to border on a seeming attempt to mislead through the device of blandly denying under oath on direct examination that a "conversation" had occurred between him and McCarthy, on the theory that since he did not respond to McCarthy Continued

thy later that day, after the picketing had started, again attempted to discuss the situation with White, the latter merely called him a "son of a bitch."

Although the picketing, with signs stating, "Local 966, IBT, White Coffee Unfair, On Strike—Please Cooperate," continued for many weeks, but had been discontinued by the time of the instant hearing, the strike has continued, and Respondent has not permitted the striking employees to return to work, notwithstanding their unconditional written offer on June 18, 1980 (Resp. Exh. 4), to do so. That offer 12 was refused by Respondent by its counsel's letter of June 27, 1980 (Resp. Exh. 5), stating:

This is to advise that the employees set forth in your letter [of June 18 unconditionally offering to return to work] who quit their jobs have been replaced and, furthermore, by reason of their unlawful activities in which they have engaged since on or about April 25, 1980, they have forfeited any rights which they may have had to their former jobs at White Coffee Corporation.

Respondent's president Irwin White expressed his theory at the hearing that his employees (other than Jones) had "quit" their jobs by engaging in a strike and picketing, thereby "abandoning" their jobs. There is no evidence that the striking employees quit or abandoned their jobs, or that they engaged in any unlawful activities.

4. Respondent's discharge of William Stubbs

William Stubbs entered Respondent's employ in or about November 1974, and was continuously employed there for 5-1/2 years until his precipitate discharge when he joined the described employees' strike on April 25 following his fellow employee Robert Jones' discharge under the circumstances set forth above.

Stubbs was a general warehouse helper, operated a coffee bagging machine, unloaded coffee trucks, operated a Hi-Lo device, was an order picker, processed merchandise orders, prepared consignments for delivery, and also (after his first 3 years on the job) roasted coffee.

On or about April 23, 1980, while traveling home with Jones, at the latter's solicitation Stubbs signed a union card. Stubbs was among the employees who assembled in the park after the April 24 workday and who voted to strike in protest against Jones' discharge earlier that day.

Stubbs' annual one-week vacation had been scheduled to start at noon on Friday, ¹³ April 25 to May 5, 1980. Prior to that, Respondent's principal, Irwin White, as well as its bookkeeper, Harriet Flax, had acceded to this scheduling. On Friday, April 25, after reporting to work around 8 a.m. as usual, Stubbs started coffee roasting operations since the regular roaster was attending his wife who was in labor. Early in the morning Stubbs reminded Smolin that he was scheduled to leave on vacation at

noon. After receiving his paycheck from Smolin at or around 9:45 a.m., Stubbs did not join the employees when they started to picket, indicating he would not do so until his roasting work was completed and orders readied for Monday (April 28). When he had accomplished this shortly prior to noon, he joined the other employees and picketed that afternoon, under the observation of Respondent's principal, White, who took notes on a pad.

On Monday, April 28, during Stubbs' vacation, Respondent dispatched a letter to Stubbs (G.C. Exh. 3) stating:

You have failed to report to work. We are in the process of obtaining replacements.

In the event we obtain a replacement for you prior to your offer to return to work, you future employment will be subject to the provisions of the law concerning employees who fail to report to work in the course of a job. 14

Seemingly this letter was received by Stubbs on his return from vacation; he did not picket during that week (April 28-May 5), and he at once telephoned Smolin on May 5 and asked him whether he could return to work. Smolin said no, adding:

Willie, if you hadn't wore [sic] a picket sign that Irwin [White] would probably let you come back to work.¹⁵

Smolin did not, however, say that Stubbs had been replaced. And Stubbs was paid for his week's vacation of April 28-May 5, notwithstanding Respondent's aforequoted letter of April 28 (G.C. Exh. 3).

The next day, May 6, Stubbs visited the plant in person. Smolin indicated he would speak to White about giving Stubbs his job back. However, Smolin soon returned and told Stubbs, who had worked steadily for Respondent for 5-1/2 years, that White would not rehire him because he had picketed. At no time did Smolin indicate that a replacement had been hired for Stubbs. At no time has Stubbs been told that he had been replaced. But also at no time since he joined the picketing on the afternoon of Friday, April 25, has Stubbs (or any other picketing employee) been permitted to come back to work for Respondent. Stubbs continued picketing on his return from vacation, concededly so observed by Respondent's president, Irwin White.

what occurred did not satisfy the technical requirements of a "conversation" and therefore need not be disclosed in his direct testimony.

¹⁸ Respondent conceded, upon the record, that all of the nine employees enumerated in the unconditional offer to return to work were on strike at the time of that offer (June 18, 1980).

¹³ Commencing a week's vacation at noon on Friday was a not unusual practice at the plant.

¹⁴ Respondent's president, Irwin White, testified that a similar letter was sent by Respondent to all strikers/picketers, at the close of the day of April 28. He also testified that, contrary to the wording of that letter that "We are in the process of obtaining replacements," all strikers had been replaced that morning (April 28) before the letter was sent out. Later, however, on cross-examination, White testified that all replacements had been hired on April 25 and that all were still there as of the date of the instant hearing; still later modifying this to state that "We may have replaced... two or three [replacements on or about] the 30th of April or maybe the 1st of May [1980]."

¹⁵ Upon comparative testimonial demeanor observations, I credit Stubbs' testimony that Smolin told him this, in preference to Smolin's denial. As shown below, there were substantial inconsistencies between Smolin's testimony on direct and on cross-examination.

B. Discussion and Resolution

1. Jones

As to Jones, Respondent's defense is that he was discharged for unsatisfactory performance of his job-specifically for allegedly persisting, contrary to Smolin's instructions, in flavoring coffee by pouring, rather than spraying, flavoring substance upon coffee beans. For a number of reasons I conclude that this defense does not hold water. To begin with, coffee flavoring was only one of many chores performed by Jones, and there is no convincing proof that he was performing any of them, including coffee flavoring, in a less than acceptable fashion. For practical purposes, Respondent's claim of Jones' inefficiency is substantially confined to his coffee flavoring activities. In that connection, the following are noted. (1) According to Jones' testimony, which I prefer and credit to that of Smolin, 16 after he was instructed by Smolin in January 1980 (soon after Jones started work) to spray rather than pour flavoring substance on coffee, at all times thereafter Jones did so, i.e., confined himself to spraying flavoring substance on coffee he flavored. 17 (2) Although Respondent testified, through less than satisfactory witness Smolin, 18 that customers were returning coffee for unsatisfactory flavor, no details as to any such alleged "returns" or the true reason (or reasons) therefor were supplied. Not a single such "customer" was produced or even identified by name. Nor was any detail provided as to the specific reason for the asserted but unproven returns. It is a matter of common knowledge and experience that coffee may not taste "right" to a particular person or be pleasing to a particular palate, for a variety of reasons-not limited to how it was or was not "flavored" by the coffee roaster, but, for example, how it was brewed or prepared before being dispensed or served. It would thus be suppositious in any event to link the alleged returns to any fault on Jones' part. (3) It was not Jones alone who flavored the coffee. Credited testimony of Jones, corroborated by credited

testimony of Stubbs, establishes that various employees¹⁹ other than Jones also regualarly flavored coffee. For this additional reason it would be suppositious to link the alleged returns to Jones.

The objective and undeniable fact of the matter is that it was not until Jones had undertaken leadership of the union organizing activities—a right guaranteed to him by the Act—that his job performance suddenly came under withering and fatal fire. This would represent a startling time coincidence which, under the circumstances, I am not prepared to accept. Cf., e.g., N.L.R.B. v. Reinauer Fuel Transportation Corporation, 661 F.2d 910 (2d Cir. 1981); N.L.R.B. v. Sequoyah Mills, Inc., 409 F.2d 606 (10th Cir. 1969); N.L.R.B. v. Dorn's Transportation Co., Inc., 405 F.2d 706, 713 (2d Cir. 1969); Tele-Trip Company Inc. v. N.L.R.B., 340 F.2d 575, 579-580 (4th Cir. 1965): N.L.R.B. v. Montgomery Ward & Co., Inc., 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). See also N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F.2d 292, 295 (2d Cir. 1972). A key element in employee discharge cases is the intent of the employer to abort union activity. "Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort." N.L.R.B. v. Longhorn Transfer Service, Inc., 346 F.2d 1003, 1006 (5th Сіг. 1965).

Respondent further contends that it was wholly unaware of Jones' union organizational activities and therefore could not have discharged him for that reason. However, for reasons already explicated preferring the testimony of Jones to that of Smolin, Smolin's statement to Jones that Jones was being fired for "fooling around vesterday in the back area"-a clear allusion to Jones' union organizational activities there on the day on which it notified him by mailgram after he had left work that he was discharged—show that Respondent, through at any rate its plant manager, Smolin, was not only well aware of Jones' union organizational activities prior to his discharge, but also that, indeed, it fired him for that very reason. Upon this basis, as well as for the reason that since Jones' organizational activities in soliciting and obtaining signatures on union cards were carried out without concealment in this small plant, 20 essentially if not wholly in a relatively small area regularly patrolled by Smolin (according to Smolin's own testimony), I find

¹⁶ Observing him closely as he testified, I was impressed with Jones' caliber as a forthright and honest witness testifying truthfully. On the other hand, Smolin, a somewhat evasive, combative witness given to overstatement, testified on cross-examination differently from his testimony on direct examination. For example, although Smolin had testified on direct examination that after he turned down Jones' request for a raise, Jones told him, "[You're] a son of a bitch," on cross-examination he appeared to embellish this to "[You're] a son of a bitch and no f-ing good"; and, whereas on direct examination he had testified that on April 23 he told Jones "You know you're not supposed to do it that way," on cross-examination he swore that what he told Jones was "You're pouring flavor from the gallon bottle right on the beans." Furthermore, contrary to Respondent's April 28, 1980, letter (G.C. Exh. 3) to Stubbs that "We are in the process of obtaining replacements. In the event we obtain a replacement for you prior to your offer to return to work. swore insistently that Stubbs was replaced on April 28 before the letter was even sent to him.

¹⁷ No reason is apparent why Jones should or would deliberately violate Smolin's instructions. I do not credit Smolin's theory that Jones did so because it was "faster," considering the practicalities of the situation, the apparent absence of any quantitative production quota work requirement, the described awkwardness of pouring from a gallon container jug wis-a-vis the simplicity of merely pressing a plunger on a much smaller and less cumbersome container in order to spray, and, finally, my assessment of the comparative testimonial demeanor of Jones and Smolin as

observed.

18 See fn. 16, supra.

¹⁹ At least five, including Fowler, Perrilli, Holland, and Santiago, as credibly testified to by Jones on rebuttal without contradiction.

²⁰ In view of Respondent's actual knowledge of Jones' union organizational activities, as established by Jones' credited testimony concerning Plant Manager Smolin's admissions in that regard, it is unnecessary to impute such knowledge to Respondent under the so-called "small plant doctrine." Cf., e.g., N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F.2d 292, 295 (2d Cir. 1972); American Spring Bed Manufacturing Company, d/b/a American Chain Link Fence Co., 255 NLRB 693 (1981); Overnite Transportation Company, 254 NLRB 132 (1981); Dynacor Plastics & Textile Div. of Medline Industries, Inc., 218 NLRB 1404, 1412 (1975); Malone Knitting Company, 152 NLRB 643, 647 (1965), enfd. 358 F.2d 880, 883 (1st Cir. 1966); Wiese Plow Welding Co. Inc., 123 NLRB 616, 618 (1959); Abbott Worsted Mills. Inc., 36 NLRB 545 (1941), enfd. 127 F.2d 438 (1st Cir. 1942).

that Respondent was in fact aware of Jones' protected organizational activities prior to his discharge.²¹

For these reasons, it is found that Jones would not have been discharged but for his union organizational activities, and that Respondent has failed through substantial credible evidence, as required,²² to rebut the General Counsel's *prima facie* showing that Jones' discharge under the described circumstances was violative of Section 8(a)(3) and (1) of the Act.²³

2. Stubbs

Certainly as to Stubbs, whom Respondent concededly observed picketing its premises commencing on the afternoon of April 25, the day after Jones' discharge, Respondent makes no contention that it was unaware of his union activities.

Respondent's defense as to Stubbs is that he was merely an economic striker who was replaced when he failed to return to work.24 However, Respondent's own letter of April 28, 1980, to Stubbs (G.C. Exh. 3)—which President White testified was mailed to Stubbs at the end of the afternoon of that day (April 28)—that "We are in the process of obtaining replacements," is contradicted by the testimony of White as well as that of Plant Manager Smolin, both of whom swore that Stubbs (as well as all other strikers) was replaced no later than the morning of April 28, i.e., before the letter of April 28 was dispatched (as testified to by Respondent's principal, Irwin White), thereby making it impossible for Stubbs and the other striking employees to avail themselves of the "opportunity" Respondent was professing to offer them in its April 28 letter "to return to work." Under these circumstances, it is difficult to escape the conclusion that Respondent intended to and indeed had already terminated or that it regarded as terminated-notwithstanding its letter of April 28-Stubbs (as well as all of the other striking employees) simply because they had gone out on strike. Indeed, Respondent's counsel's letter of June 27, 1980 (Resp. Exh. 5), in response to the Union's letter of June 18, 1980 (Resp. Exh. 4), unconditionally offering all employees to return to work, comes close to so stating, as did Respondent's principal, Irwin White, at the hearing and as does Respondent's position in closing argument, viz, that the employees had "quit" (Resp. Exh. 5) their jobs through their strike action without more. This, however, flies in the face of the Act, which guarantees employees the right to do so free from such reprisals as iob loss.25 26 Furthermore, since, based on my close observations of his testimonial demeanor, I am persuaded that Stubbs was essentially²⁷ credible; again in contrast to my observations about Smolin,28 I credit Stubbs' assertions, in preference to Smolin's denials, that Stubbs did indeed ask Smolin why he was being fired; that Smolin did indeed remark to him that "Willie, if you hadn't wore [sic] a picket sign that Irwin [White] would probably let you come back to work"; and also that, when Stubbs visited the plant personally a day later to reclaim his clothes, Smolin did indeed tell Stubbs that White would not rehire him because he had picketed. I find Smolin's outright denials that Stubbs ever asked him why he was being or had been fired to be singularly unpersuasive and incredible, particularly considering the fact that Stubbs had been in Respondent's employ for some 5-1/2 years. Under these circumstances, it is so unlikely as to be well nigh incredible on its face that Stubbs would not even have asked why he was suddenly being

Again in the case of Stubbs, as in the case of Jones, Respondent's explanation "fail[s] to stand under scrutiny" (N.L.R.B. v. Dant, 207 F.2d 165, 167 (9th Cir. 1953)) and the only feasible explanation that remains²⁹ is that his union activity, even after 5-1/2 years of satisfactory employment, cost him his job. Since, as in the case of Jones, Respondent has thus failed to rebut the General Counsel's prima facie case, it is likewise in this aspect determined that Respondent through its discharge of Stubbs violated Section 8(a)(3) and (1) of the Act.

3. Character of the strike as an unfair labor practice strike

It is crystal clear under the circumstances presented that the strike which started on April 25, on the heels of the discharge of the Union's organizational leader, Jones, was provoked and precipitated by Jones' discharge, and that throughout its further course that remained its root cause and that it retained that character. Since it was not an economic strike, but was provoked and occasioned by Respondent's discharge of Jones, and, since that discharge was properly regarded as an unfair labor practice in violation of the Act, the strike itself was, has re-

²¹ Since Respondent disclaims all knowledge as to Jones' organizational activities, there is no contention or evidence that these were carried on during working time or otherwise improperly or in violation of work rules.

²² Administrative Procedure Act, 5 U.S.C. Secs. 556(d) and 706(2)(E); Wright Line, infra at fn. 23.

²³ Cf., e.g., N.L.R.B. v. Lloyd A. Fry Roofing Company, Inc. of Delaware, 651 F.2d 442 (6th Cir. 1981); Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d 466 (9th Cir. 1966); Heartland Food Warehouse, Division of Purity Supreme Supermarkets, 256 NLRB 940 (1981); Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980).

²⁴ This places the best possible face on Respondent's contention since, as shown above, Respondent wrote Stubbs during his vacation (G.C. Exh. 3) that he was in process of being replaced for having "failed to report to work" on April 28.

²⁵ Secs. 1, 2(3), 7, and 8(a)(1) and (3); N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 618 (1969); N.L.R.B v. Washington Aluminum Company, Inc., 370 U.S. 9 (1962). See also cases cited infra at fns. 30, 33, and 34.

²⁶ In this connection, it is observed that, during closing argument, Respondent indicated it remains unwilling to accord the striking employees even so much as preferential hiring status if any of their jobs open up (which it would have to accord them even if they were only economic, as distinguished from unfair labor practice, strikers, cf. *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970))—now claiming additionally that they forfeited that right through alleged strike misconduct in no way shown here. (Respondent maintains that the issue of strike or picketing misconduct is reserved to it for litigation in any backpay proceeding supplemental hereto, if reached.)

²⁷ Typical and insubstantial difficulties as to specific dates aside. These difficulties are regularly encountered among witnesses and, particularly in the case of a patently honest witness like Stubbs, do not in my estimation detract from his credibility.

²⁸ See fn. 16, supra.

²⁹ Cf. Wright Line and other cases cited supra at fn. 23.

mained, and is an unfair labor practice strike. 30 Accordingly, the striking employees did not lose their character as employees under the Act, Respondent did not have the right by reason thereof to terminate or permanently replace them or to regard or treat them as having "quit" their jobs or its employ, and Respondent is required upon the record here presented to restore them to those jobs (or, if not available, equivalent jobs) and to make them whole, to the extent required by law, for the consequences of its actions.

It is found and determined that the strike which incepted on April 25, 1980, under the circumstances described, was, remained, and is an unfair labor practice strike, and that all striking employees therein were and are unfair labor practice strikers.³¹

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted in this proceeding.

B. Through its actions as described in section III, supra, terminating the employment of and at all times since then failing and refusing to reinstate or rehire its employees Robert Jones and William Stubbs under the circumstances there set forth, Respondent has discriminated and continues to discriminate in regard to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) of the Act; and has thereby, further, interfered with, restrained, and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1) of the Act, and continues so to do.

C. The foregoing unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

D. The strike of Respondent's employees which commenced on April 25, 1980, was precipitated, provoked, and caused by Respondent's aforedescribed unfair labor practice on April 24, 1980, in discharging Robert Jones, leader of the union organizational activities among Respondent's employees, and was in its inception and has continued since then to be and is an unfair labor practice strike, and has been prolonged and is continuing to be prolonged by reason of Respondent's unfair labor practices as described and found herein.

THE REMEDY

Having been found to have terminated the employment of employees Robert Jones and William Stubbs in violation of Section 8(a)(3) and to have interfered with, restrained, and coerced them and other employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, Respondent should, as is usual in such cases, be required to cease and desist from continuing

these or other such violations, offer the discharged employees³² reinstatement, and recompense those employees with backpay and interest at the adjusted prime interest rate as currently calculated by the Internal Revenue Service on tax delinquencies, computed as explicated in F. W. Woolworth Company, 90 NLRB 289 (1950); Isis Plumbing & Heating Co., 138 NLRB 716 (1962); and Florida Steel Corporation, 231 NLRB 651 (1977). The backpay of Robert Jones should be calculated as of the date of his actual discharge, April 24, 1980; that of William Stubbs, as of the date of his constructive discharge, May 5, 1980, when, upon the expiration of his 1 week's paid vacation, he was not permitted to resume the job he had held for 5-1/2 years although he asked to return.

As to Respondent's other employees here found to be unfair labor practice strikers, Respondent should be required to reinstate them, if necessary discharging their replacements if any,³³ and to recompense them with backpay and interest, calculated as set forth above, from the date they offered unconditionally to return to work, i.e., June 18, 1980.³⁴

Respondent should also, as customary, be required to preserve and open its books and records to the Board's agents for backpay computation and compliance determination purposes. In view of the serious nature of the violations here, discriminatory discharges for exercising rights guaranteed by the Act, and Respondent's intransigent continuing insistence that its striking employees—likewise exercising rights guaranteed by the Act—have "quit their jobs" and "have forfeited any rights which they may have had to their former jobs" (Resp. Exh. 5), Respondent should further be ordered to cease and desist from in any way violating its employees' rights under the Act, 35 since those violations go to "the very heart of the

³⁰ Cf., e.g., Jacques Syl Knitwear, Inc., 247 NLRB 1525 (1980); King Radio Corporation, Inc., 172 NLRB 1051 (1968), enfd. 416 F.2d 569 (10th Cir. 1969), cert. denied 397 U.S. 1007 (1970); D'Armigene, Inc., 148 NLRB 2 (1964), enfd. 353 F.2d 406 (2d Cir. 1965).

³¹ See, e.g., cases cited supra at fn. 30.

³² Respondent concedes that it discharged Jones. Respondent's failure and refusal to permit Stubbs to return to his 5-1/2-year-old job on May 5 when his week's vacation was over, for the reason that he had engaged in picketing, was equivalent to a discharge.

N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938);
 N.L.R.B. v. Pope Maintenance Corp., 573 F.2d 898, 907 (5th Cir. 1978);
 N.L.R.B. v. Fotochrome, Inc., 343 F.2d 631, 633 (2d Cir. 1965), cert. denied 382 U.S. 833.

³⁴ See Resp. Exh. 4. The striking employees, aside from Jones and Stubbs, so offering were Jeffrey Shettlewood, Terrence Daniel, William Paulides, Jerry Fowler, Donald White, Alfonso D. Holland, and Vincent Santiago. Although unfair labor practice strikers are normally entitled to backpay commencing 5 days after their unconditional offer to return to work (Harris-Teeter Super Markets, Inc., 242 NLRB 132, fn. 2 (1979)), where, as here (Resp. Exh. 5), the employer clearly indicates that it will not reinstate them, the backpay obligation commences as of the date of the employees' unconditional offer to return. O & F Machine Products Company, 239 NLRB 1013, fn. 3 (1978); Harris-Teeter, supra.

Even if the strikers here had been economic strikers, the effect of Respondent's June 27 letter (Resp. Exh. 5), refusing to regard them as employees, would have had the effect of converting such an economic strike to an unfair labor practice strike, entitling them to backpay as well as reinstatement. Cf., e.g., Raimund Corssen Co., Inc., d/b/a Raycor Co., 249 NLRB 565 (1980). See also N.L.R.B. v. W. C. McQuaide, Inc., 617 F.2d 349 (3d Cir. 1980); N.L.R.B. v. United States Cold Storage Corporation, 203 F.2d 924 (5th Cir. 1953), cert. denied 346 U.S. 818 (1953); King Radio Corporation, Inc., 172 NLRB 1051, 1071, 1074, fns. 61 and 64 (1968), enfd. 416 F.2d 659 (10th Cir. 1969), cert. denied 397 U.S. 1007 (1970); The Laidlaw Corporation, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 20, 1970); N.L.R.B. v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967); N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 32-34 (1967).

³⁵ Cf., e.g., N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532, 536 (4th Cir. 1941)

Act."36 Finally, Respondent should be required to post on its premises the usual informational notice to employees, as well as to mail copies to the strikers whom it has refused to take back into its employ.37

The Charging Party Union additionally seeks an electionless bargaining order in view of the egregious nature of Respondent's unfair labor practices, citing N.L.R.B. v. Gissel Packing Co., Inc., supra at 613-614; and United Dairy Farmers Cooperative Assn. v. N.L.R.B., 633 F.2d 1054 (3d Cir. 1980). The General Counsel, on the other hand, seeks no such relief. Because I am unaware of any

case in which the Board has issued an electionless bargaining order in the absence of proof of union majority status in the bargaining unit, and since there is not only no established union majority but not even any union bargaining authorization cards in evidence—although there is credible indication that some such were signed—and considering that it is to be presumed that the General Counsel, having the laboring oar in the prosecution of this proceeding, would have presented such proof if available and pressed such contention if warranted, coupled with the final fact that not even the Charging Party was presented such proof, I will not recommend inclusion of a bargaining order under the circumstances.

[Recommended Order omitted from publication.]

³⁶ A. J. Krajewski Manufacturing Co., Inc., 180 NLRB 1071 (1970).

³⁷ This is to assure that those employees, no longer working at Respondent's plant, are apprised of this Decision. See *Creative Engineering*. *Inc.*, 228 NLRB 582, 583 (1977).